



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 14, 2010

Ms. Rebecca Brewer  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2010-13925

Dear Ms. Brewer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 393552.

The Wylie Police Department (the "department"), which you represent, received a request for all information relating to a specified investigation, including reports, records, physical and documentary evidence, and related investigative findings. You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note the requested physical evidence is not subject to the Act. The Act applies to "public information," which is defined as information collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body, and the governmental body owns the information or has a right of access to it. *Id.* § 552.002. This office has ruled that tangible physical items are not "information" as that term is contemplated under the Act. *See, e.g.,* Open Records Decision No. 581 (1990). Thus, any responsive tangible physical evidence maintained by the department is not public information, and the department is not required to release such tangible evidence to the requestor in response to the present request. *See Gov't Code §§ 552.002, .021.*

Next, you inform us Exhibit B is the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2010-09881 (2010). In that ruling, we

concluded the information at issue was used in an investigation under chapter 261 of the Family Code and the department therefore must withhold it under section 552.101 of the Government Code. We note, however, Exhibit B is now part of a murder investigation. Thus, we find the circumstances relating to the investigation have changed, and the department may not continue to rely on Open Records Letter No. 2010-09881 as a previous determination for Exhibit B. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address your arguments against the disclosure of the submitted information.

Next, we note the submitted information includes documents filed with a court, which are expressly public under section 552.022(a)(17) of the Government Code. *See* Gov't Code § 552.022(a)(17). Such information must be released unless it is expressly confidential under "other law." You claim the court-filed documents are excepted from disclosure under section 552.108 of the Government Code. However, section 552.108 is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022(a)(17). *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). Therefore, the department may not withhold these court-filed documents, which we have marked, under section 552.108 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You ask whether the submitted information is confidential under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d 1320d-9. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the release of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. *Id.* § 164.502(a).

This office addressed the interplay of the Privacy Rule and the Act in Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision

No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v Tex Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may not withhold the information at issue on that basis.

Next, we note the submitted information contains medical records subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 552.101 of the Government Code also encompasses the MPA. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). Portions of the submitted information, which we have marked, consist of medical records of a deceased individual. The medical records of a deceased patient may be released on the signed written consent of the decedent's personal representative. *See* Occ. Code §§ 159.005(a)(5). Therefore, the department may release these records only in accordance with the MPA.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides in pertinent part:

(a) The following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this

code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find a portion of Exhibit B consists of a report of alleged or suspected abuse or neglect made under chapter 261 of the Family Code. *See* Fam. Code § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code, ch. 261). Thus, this information, which we have marked, falls within the scope of section 261.201 of the Family Code. You do not inform us the department has adopted any rule governing the release of this type of information. Therefore, we assume no such rule exists. The requestor claims a right of access to this information under section 700.203(a)(2) of title 40 of the Texas Administrative Code. We note, however, section 700.203 applies to information maintained by the Texas Department of Family and Protective Services, and not to information maintained by the department. *See* 40 T.A.C. § 700.203. Accordingly, we find this information, which we have marked, is confidential pursuant to section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). As noted above, however, we find the remaining information was not used or developed in an investigation of child abuse under chapter 261, but rather, relates to a murder investigation. Thus, we conclude the remaining information is not confidential under section 261.201 of the Family Code and may not be withheld under section 552.101 on that basis.

You assert the remaining information is confidential under section 264.613 of the Family Code. Section 264.613 pertains to court-appointed volunteer advocate programs that provide children’s advocacy services and states:

- (a) The files, reports, records, communications, and working papers used or developed in providing services under this subchapter are confidential and not subject to disclosure under [the Act] and may only be disclosed for purposes consistent with this subchapter.
- (b) Information described by Subsection (a) may be disclosed to:
  - (1) the department, department employees, law enforcement agencies, prosecuting attorneys, medical professionals, and

other state agencies that provide services to children and families;

(2) the attorney for the child who is the subject of the information; and

(3) eligible children's advocacy centers.

(c) Information related to the investigation of a report of abuse or neglect of a child under Chapter 261 and services provided as a result of the investigation are confidential as provided by Section 261.201.

Fam. Code § 264.613. As previously noted, the submitted information pertains to a murder investigation involving a child victim. You have not explained, nor is it apparent from the submitted information, how the information at issue pertains to a court-appointed volunteer advocate program for purposes of subchapter G of chapter 264 of the Family Code. *See id.* § 264.601(2) (defining volunteer advocate program). Thus, you have failed to demonstrate the information at issue consists of files, reports, records, communications, or working papers used or developed in providing services under subchapter G, and none of it may be withheld under section 552.101 on that basis.

Section 552.108 of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime [.]". Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You provide an affidavit from the department police chief, who states the submitted information relates to a pending criminal investigation. We note the remaining information at issue includes a *Miranda* warning signed by the arrestee. Because a copy of this document, which we have marked, has been provided to the arrestee, we find its release will not interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). Therefore, the department may not withhold the *Miranda* warning under section 552.108(a)(1). However, based on the chief's representation and our review, we conclude the release of the remaining information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests present in active cases).

Section 552.108, however, does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. *See* 531 S.W.2d at 186-88; *see also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston*

*Chronicle*). Thus, with the exception of basic information, the department has established the remaining information is subject to section 552.108(a)(1) of the Government Code.

However, we must address the requestor's claim of a right of access to the remaining information under federal law. In this instance, the requestor is a representative of Advocacy, Inc. ("Advocacy"), which has been designated as the state's protection and advocacy system ("P&A system") for purposes of the federal Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. §§ 10801-10851, the Developmental Disabilities Assistance and Bill of Rights Act (the "DDA Act"), 42 U.S.C. §§ 15041-15045, and the Protection and Advocacy of Individual Rights Act (the "PAIR Act"), 29 U.S.C. § 794(e). *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 CFR §§ 51.2 (defining "designated official" and requiring official to designate agency to be accountable for funds of P&A agency), 51.22 (requiring P&A agency to have a governing authority responsible for control).

We note a state statute is preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex.1995). Further, federal regulations provide that state law must not diminish the required authority of a P&A system. *See* 45 C.F.R. § 1386.21(f); *see also Iowa Protection and Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D. Iowa 2001); *Iowa Prot. & Advocacy Servs., Inc. v. Gerard*, 274 F. Supp. 2d 1063 (N.D. Iowa 2003) (broad right of access under section 15043 of title 42 of the United States Code applies despite existence of any state or local laws or regulations which attempt to restrict access; although state law may expand authority of P&A system, state law cannot diminish authority set forth in federal statutes); *cf.* 42 U.S.C. § 10806(b)(2)(C). Similarly, Texas law states, "[n]otwithstanding other state law, [a P&A system] . . . is entitled to access to records relating to persons with mental illness to the extent authorized by federal law." Health & Safety Code § 615.002(a). Thus, PAIMI, the DDA Act, and the PAIR Act grant Advocacy access to "records" and to the extent state law provides for the confidentiality of "records" requested by Advocacy, its federal right of access preempts state law. *See* 42 C.F.R. § 51.41(c); *see also Equal Employment Opportunity Comm'n*, 905 F. Supp. at 382. Accordingly, we must address whether the remaining information constitutes "records" of individuals with mental illness as defined by PAIMI, the DDA Act, and the PAIR Act.

PAIMI provides, in relevant part, that a P&A system "shall . . . have access to all records of . . . any individual who is a client of the system if such individual . . . has authorized the system to have such access[.]" 42 U.S.C § 10805(a)(4)(A). The term "records," as used in the above-quoted provision,

includes reports prepared by any staff of a facility rendering care and treatment [to the individual] or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring

at such facility and the steps taken to investigate such incidents, and discharge planning records.

*Id.* § 10806(b)(3)(A); *see also* 42 C.F.R. § 51.41(c) (addressing P&A system's access to records under PAIMI). The DDA Act provides, in relevant part, that a P&A system shall

(B) have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

(I) have access to all records of—

(i) any individual with a developmental disability who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access[.]

(J)

(i) have access to the records of individuals described in subparagraphs (B) and (I), and other records that are relevant to conducting an investigation, under the circumstances described in those subparagraphs, not later than 3 business days after the [P&A system] makes a written request for the records involved[.]

42 U.S.C § 15043(a)(2)(B), (I)(i), (J)(i). The DDA Act states that the term “record” includes

(1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;

(2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and

(3) a discharge planning record.

*Id.* § 15043(c). The PAIR Act provides, in relevant part, that a P&A system will “have the same general authorities, including access to records . . . as are set forth in subtitle C” of the DDA Act, 42 U.S.C. § 15041 *et seq.* *See* 29 U.S.C. § 794e(f)(2).

The PAIMI Act, the DDA Act, and the PAIR Act grant a P&A system, under certain circumstances, access to “records.” Each of the acts has a separate, but similar, definition of “records.” The principal issue which we must address in this instance is whether the remaining information constitutes a “record” under either of those acts. In this instance, the remaining information is related to a criminal law enforcement investigation and is being utilized for law enforcement purposes. We note the remaining information is not among the information specifically listed as a “record” in sections 10806(b)(3)(A) and 15043(c).

The requestor contends, however, the information listed in sections 10806(b)(3)(A) and 15043(c) was not meant to be an exhaustive list.<sup>1</sup> The requestor contends it was Congress’s intent to grant a P&A system access to any and all information, including the particular information at issue here, the system deems necessary to conduct an investigation. We disagree. By these statutes’ plain language, access is limited to “records.” *See In re M&S Grading, Inc.*, 457 F.3d 898, 901 (8th Cir. 2000) (analysis of a statute must begin with its plain language). Although the definitions of “records” in the PAIMI and DDA Acts are not limited to the information specifically enumerated in sections 10806(b)(3)(A) and 15043(c), we do not believe Congress intended for the definitions to be so expansive as to grant a P&A system access to any information that it deems necessary. Such a reading of the statutes would render sections 10806(b)(3)(A) and 15043(c) insignificant. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statute should be construed in a way that no clause, sentence, or word shall be superfluous, void, or insignificant). Furthermore, in light of Congress’s evident preference for limiting the scope of access, we are unwilling to assume Congress meant more than it said in enacting the PAIMI Act and the DDA Act. *See Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995) (stating statutory construction must begin with language of statute; to do otherwise would assume Congress does not express its intent in words of statutes, but only by way of legislative history); *see generally Coast Alliance v. Babbitt*, 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress’s plain language in statute, agency cannot carry out Congress’s intent, remedy is not to distort or ignore Congress’s words, but rather to ask Congress to address problem).

Based on the foregoing analysis, we believe the information specifically enumerated in sections 10806(b)(3)(A) and 15043(c) is indicative of the types of information to which Congress intended to grant a P&A system access. *See Penn. Protection & Advocacy Inc. v. Houstoun*, 228 F.3d 423, 426 n.1 (3rd Cir. 2000) (“[I]t is clear that the definition of “records” in § 10806 controls the types of records to which [the P&A agency] ‘shall have access’ under § 10805[.]”). As previously noted, the submitted information is not among the information specifically listed as “records” in sections 10806(b)(3)(A) and 15043(c). Furthermore, we find the remaining information is not the type of information to which Congress intended to grant a P&A system access. Accordingly, we find Advocacy does not have a right of access to the information at issue under either PAIMI or the DDA Act. In addition, because the PAIR Act grants the same access as the DDA Act, Advocacy does not

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<sup>1</sup>Use of the term “includes” in sections 10806(b)(3)(A) and 15043(c) of title 42 of the United States Code indicates the definitions of “records” are not limited to the information specifically listed in those sections. *See St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir. 1996); *see also* 42 C.F.R. § 51.41.

have a right of access under the PAIR Act. We therefore conclude that, except for the *Miranda* warning and basic information under section 552.108(c), the department may withhold the remaining information under section 552.108(a)(1) of the Government Code.<sup>2</sup>

In summary, the department must release the court-filed documents which we have marked as subject to section 552.022(a)(17) of the Government Code. The department may release the medical records we have marked only in accordance with the MPA. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Except for the *Miranda* warning and basic information, the department may withhold the remaining information under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 393552

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.